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July 21, 1988

Alden H. Howard, Commissioner
Department of Environmental Services
Hazen Drive
Concord, NH 03301

Re: Funding Provisions of RSA 149-B:1,II

Dear Commissioner Howard:

We have reviewed your recent inquiry concerning the funding provisions of RSA 149-B:1,II.¹ As we understand it, you are requesting clarification regarding the following issues:

(1) Whether the municipalities enumerated in RSA 149-B:1,II may secure long-term bonding prior to completion of the project and, if so, whether the State may contribute to the repayment of any long-term bond prior to the project's completion.

¹ RSA 149-B:1,II reads in pertinent part as follows:

Notwithstanding the provisions of paragraph I, the State of New Hampshire shall make a grant to the respective communities for the following specific projects which are enumerated in this paragraph, in an amount that, subsequent to the application of all available federal funds and the 5 percent local share of each said project, shall provide funds to pay for all interest costs incurred by issuance of bond anticipation notes and upon completion of said project shall provide funds which are equivalent to the annual amortization charges, meaning principal and interest, on the remaining portion of the eligible costs resulting from the acquisition and construction of said sewage disposal facilities....



(2) Whether the municipalities enumerated in RSA 149-B:1,II are subject to the funding provisions provided for therein, even though these municipalities will receive the maximum federal funding (75%) anticipated by RSA 149-B:1,I, the traditional wastewater treatment project funding provision.

Our interpretation of RSA 149-B:1,III reveals no provision that forbids the municipalities enumerated therein from securing long-term bonding prior to the completion of the project. Municipalities, however, would have to bear the resultant financial burden until the project's completion in that the State is foreclosed from any such contribution prior to the project's completion. Similarly, even in cases where the municipalities enumerated in RSA 149-B:1,II will receive full federal funding in accordance with RSA 149-B:1,I, i.e. up to 75% of the total project cost, the State may not provide funds for the repayment of any long term bonds associated with such projects prior to their completion.

DISCUSSION

Under the provisions of RSA 149-B:1,I it has been the practice for municipalities to secure long-term bonding to finance twenty-five (25) percent of wastewater treatment project costs prior to project completion². This bonded amount is used to satisfy the obligations of the State and the municipality. During the term of the bond issue the State pays the annual amortization costs to the extent of twenty (20) percent of the total eligible project costs. Municipalities are responsible for the remaining five (5) percent. However, as noted above these funding provisions have been altered significantly for certain municipalities by RSA 149-B:1,II.³

² The United States Environmental Protection Agency historically has provided seventy-five (75) percent of the total project cost pursuant to the Clean Water Act (33 U.S.C. 1251 et seq.). As you are aware, the USEPA is currently phasing out this aspect of its construction grants program and instead will be supplementing a state revolving fund from which municipalities may borrow.

³ Under the provisions of RSA 149-B:1,II, the State is required to contribute an amount, subsequent to an application for any federal funding available, up to ninety-five (95) percent of the total eligible costs. In essence, for the projects in the eleven municipalities enumerated in RSA 149-B:1,II, the State is assuming not only its customary twenty (20) percent share of the total project cost, but also any unfunded portion of the federal seventy-five (75) percent share. As with RSA 149-B:1,I the municipality is responsible for paying five (5) percent of the total project costs.

Turning to the language of RSA 149-B:1,II, there can be very little disagreement as to the meaning of the words "and upon completion of said project shall provide funds which are equivalent to the annual amortization charges" They are clear and unambiguous. The statute fails to set forth the definition of any of these words or terms contrary to their usual and common meaning. Hence, giving these words their common and usual meaning, the effect of this provision is that the state is forbidden from contributing to the funding of annual amortization costs incurred from long-term bond issues for those projects in the enumerated municipalities prior to their completion. See, e.g., Town of Rye, et al. v. PSNH, Slip Op. at 3 (3/29/88).

While this language precludes the State from contributing to the annual amortization costs of long-term bonding prior to project completion, nothing contained therein suggests that the enumerated municipalities may not secure long-term bonding whenever they choose. The municipalities, of course, would necessarily do so at their own expense. Although this option may not be economically feasible for any of the enumerated municipalities, we point it out for your consideration. If the Department wishes to pursue further the legal issues surrounding this alternative, please feel free to contact me.

As to the issue of the applicability of RSA 149-B:1,I to the enumerated municipalities in RSA 149-B:1,II, the statutory language is equally clear. RSA 149-B:1,II states, in pertinent part:

Notwithstanding the provisions of paragraph I, the State shall make a grant to the respective communities for the following specific projects which are enumerated in this paragraph....

The term "notwithstanding" has been interpreted by the courts to mean "without prevention or obstruction from or by, or in spite of." King v. Sununu, 126, N.H. 302, 306 (1985). Therefore, this provision requires the State to make a grant to the communities enumerated therein in spite of paragraph I. This language gives little discretion to the Department as to which funding provision must be applied with regard to those municipalities and projects enumerated in RSA 149-B:1,II. "In spite of" directs the Department to ignore the provisions of paragraph I when funding the enumerated projects. Further reading of the language of RSA 149-B:1,II reveals

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that no distinction has been made as to those municipalities that will realize federal funding shortfalls and those that will not. In short, the funding provisions of RSA 149-B:1,II apply to the municipalities enumerated therein, and not the provisions of RSA 149-B:1,I, regardless of the amount of federal funding available.

Moreover, when confronted with two statutes of possible application, the statute enacted most recently controls especially when that statute is more specific in the manner in which it deals with the subject. Board of Selectmen of Town of Merrimack v. Planning Board Town of Merrimack, 118 N.H. 150, 152 (1978). In this case, not only was RSA 149-B:1,II enacted most recently, but it expressly mentions the individual municipalities as well as the projects involved. RSA 149-B:1,I, by contrast, is far more general in that it applies to all municipalities receiving federal funding for the construction or acquisition of any sewage disposal facility. Hence, while the availability of full federal funding for those municipalities enumerated in RSA 149-B:1,II may not have been contemplated by the legislature, RSA 149-B:1,II as drafted applies to all projects and municipalities enumerated therein regardless of whether or not federal funding shortfalls are anticipated or realized.

I trust this letter is responsive to your request. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,



Robert P. Cheney, Jr.
Senior Assistant Attorney General
Environmental Protection Bureau

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